No. 91-10

In The

Supreme Court of the United States

October Term, 1992

SPECTRUM SPORTS, INC. and
KENNETH B. LEIGHTON,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN,
d/b/a SORBOTURF ENTERPRISES,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENT TO JOINT APPENDIX

*Jeffrey M. Shohet
Marcelle E. Mihaila
Gray, Cary, Ames & Frye
401 B Street, Suite 1700
San Diego, California 92101
(619) 699-2742
Counsel for Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTRODUCTION 437

PLAINTIFFS' PROPOSED INSTRUCTION NO. 124 ... 438

PLAINTIFFS' PROPOSED INSTRUCTION NO. 125 ... 440

PLAINTIFFS' PROPOSED INSTRUCTION NO. 126 ... 442

PLAINTIFFS' PROPOSED INSTRUCTION NO. 127 ... 444

PLAINTIFFS' PROPOSED INSTRUCTION NO. 128 ... 446

INTRODUCTION

This supplement to the Joint Appendix contains copies of Plaintiffs Proposed Instructions No. 124-128 as they were read to the jury by the trial judge in open court. J.A. 251-256 is a transcription of the reporters transcript of these instructions which mistranscribed what was read by the trial judge in several material respects. This is shown by a review of J.A. 246-250 setting forth the discussion between counsel and the trial judge as to the final instructions to be given and R. 4389-4393 identifying those instructions that were incorrectly read by the court.

PLAINTIFFS' PROPOSED INSTRUCTION NO. 124

ATTEMPT TO MONOPOLIZE

Elements

~~Even if you do not find that defendants monopolized the relevant market, you may still find that they illegally attempted to monopolize the market.~~[1] Plaintiff *also*[2] alleges that it was injured by defendants' unlawful attempt to monopolize. In order to win on its claim of attempted monopolization, plaintiffs must prove each of the following elements by a preponderance of the evidence:

First, that defendants had a specific intent to achieve monopoly power in a relevant market;

Second, that defendants engaged in exclusionary or restrictive conduct in furtherance of its specific intent;

Third, that there was a dangerous probability that defendants would sooner or later achieve its goal of monopoly power in the relevant market;

Fourth, that defendants' conduct occurred in or affected interstate commerce; and

Fifth, that plaintiff was injured in her business or property by defendants' exclusionary or restrictive conduct.

If you find that the evidence is insufficient to prove any one or more of these elements, then you must find for

---

[1] Deleted by Court. J.A. 248.

[2] Added by Court. J.A. 248.

defendants and against plaintiff on plaintiff's attempt to monopolize claim.

If plaintiff has shown that defendants engaged in predatory conduct you may infer from that evidence the specific intent and the dangerous probability elements of the offense, without any proof of relevant market or the defendants' market power.

AUTHORITIES:

Lassig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); American Bar Association Section of Antitrust Law, *Sample Jury Instructions in Civil Antitrust Cases*, Attempt to Monopolize – Instruction 1, p. C-87 (1987).

GIVEN AS REQUESTED _____

GIVEN AS MODIFIED _____

REFUSED _____

WITHDRAWN _____

_____

JUDGE, FEDERAL
DISTRICT COURT

PLAINTIFFS' PROPOSED INSTRUCTION NO. 125

ATTEMPT TO MONOPOLIZE

Specific Intent

In this case, plaintiff argues that the conduct underlying the claim of attempt to monopolize also constitutes an unreasonable restraint of trade under Section 1 of the Sherman Act. *Specifically, plaintiff claims that defendants engaged in vertical price fixing, a horizontal territory division arrangement and a group boycott in furtherance of the attempt to monopolize the markets for athletic shoe inserts, ~~visco-elastic~~[3] polymer shoe inserts and Sorbothane athletic shoe inserts in the United States.* If you find on the basis of this conduct that plaintiff has proved a substantial claim of restraint of trade under the instructions you have received pertaining to Section 1 of the Sherman Act, then you may infer from such conduct that defendants had the specific intent to achieve monopoly power. Specific intent may also be inferred from conduct clearly threatening to competition or clearly exclusionary; that is, conduct whose anticipated benefits are dependent upon its tendency to discipline or eliminate competition and thereby enhance a firm's long term ability to reap the benefits of monopoly power.

AUTHORITIES:

Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1192-93 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985); American Bar

---

[3] Deleted by Court. J.A. 249.

Association Section of Antitrust Law, *Sample Jury Instructions in Civil Antitrust Cases*, Attempt to Monopolize – Instruction 3, pp. C-93 through C-94 (1987).

GIVEN AS REQUESTED _____

GIVEN AS MODIFIED _____

REFUSED _____

WITHDRAWN _____

_____

JUDGE, FEDERAL
DISTRICT COURT

PLAINTIFFS' PROPOSED INSTRUCTION NO. 126

ATTEMPT TO MONOPOLIZE

Exclusionary or Restrictive Conduct

Another element of the offense of attempt to monopolize is that defendants engaged in exclusionary or restrictive conduct in furtherance of its specific intent.

The offense of attempt to monopolize is concerned only with unreasonable acts or practices that have the actual or reasonably foreseeable effect of substantially impairing competition in a relevant market in an unnecessarily restrictive way or of destroying competition.

The antitrust laws encourage vigorous and honest competition, and the mere fact that one company is successful in winning sales or market share from its competitors does not mean that its conduct is exclusionary or anticompetitive. Conduct that involves the introduction of superior products, the lowering of production costs, the exercise of superior business judgment, or reasonably responding to competition can never be found to be exclusionary or restrictive. But some practices that promote competition in the short run may be illegal under the Sherman Act if they impair competition in an unnecessarily restrictive way or are used to attain a monopoly by eliminating competition.

Although the exclusionary or restrictive acts need not have been sufficient in themselves to bring about a monopoly, plaintiff must prove that the acts or practices engaged in by defendants had a significant exclusionary or restrictive effect or are of the type which, if continued are likely to result ultimately in a monopoly.

AUTHORITIES:

Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); American Bar Association Section of Antitrust Law, *Sample Jury Instructions in Civil Antitrust Cases*, Attempt to Monopolize – Instruction 4, pp. C-96 through C-97 (1987).

GIVEN AS REQUESTED _____

GIVEN AS MODIFIED _____

REFUSED _____

WITHDRAWN _____

_____

JUDGE, FEDERAL
DISTRICT COURT

PLAINTIFFS' PROPOSED INSTRUCTION NO. 127

ATTEMPT TO MONOPOLIZE

Lessig Rule

In some cases, it may not be necessary to prove a relevant market and a firm's power in that market in order to show a dangerous probability of success. A dangerous probability of success may be inferred either from direct evidence of specific intent plus conduct directed toward accomplishing the unlawful design or from evidence of conduct alone, provided that it is conduct that either forms the basis for a substantial restraint of trade or is clearly threatening to competition or clearly exclusionary.

Therefore, even if plaintiff has not proved that defendants had power in a relevant market, you may still find for plaintiff on the claim of attempt to monopolize if you find from direct evidence that defendants specifically intended to achieve monopoly power and you further find that defendants engaged in conduct harmful to competition in furtherance of that intent. Furthermore, even in the absence of direct evidence of specific intent, you may find for plaintiff if you conclude either that defendants engaged in conduct that formed the basis for a substantial restraint of trade under section 1 of the Sherman Act under the instructions you have received concerning conspiracies or combinations in restraint of trade or that the conduct was plainly harmful to competition or exclusionary, that is, that its benefits were dependent upon its tendency to discipline or eliminate competition and thereby enable defendant to reap the benefits of monopoly power in the future.

BEST AVAILABLE COPY

AUTHORITIES:

William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1029-30, n.11 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); American Bar Association Section of Antitrust Law, *Sample Jury Instructions in Civil Antitrust Cases*, Attempt to Monopolize – Instruction 6, pp. C-102 through C-103 (1987).

GIVEN AS REQUESTED _____

GIVEN AS MODIFIED _____

REFUSED _____

WITHDRAWN _____

JUDGE, FEDERAL
DISTRICT COURT

PLAINTIFFS' PROPOSED INSTRUCTION NO. 128

ATTEMPT TO MONOPOLIZE - REFUSAL TO DEAL

Unilateral refusals to deal are acceptable only "[i]n the absence of any purpose to create or maintain a monopoly." Thus, a business, especially one with a large degree of market power, may violate Section 2 of the Sherman Act if it exercises its power to deal with others, including its own distributor, to achieve or maintain a monopoly.

Supply and credit restrictions imposed by a manufacturer upon a single distributor in an attempt to put the distributor out of business and thereby further manufacturer's attempts to monopolize have been held sufficient to support a claim for attempted monopoly.

AUTHORITIES:

United States v. Colgate & Co., 250 U.S. 300, 307 (1919); *General Industries Corporation v. The Hartz Mountain Corporation*, 810 F.2d 795, 803-804 (8th Cir. February 4, 1987).

GIVEN AS REQUESTED _____

GIVEN AS MODIFIED _____

REFUSED _____

WITHDRAWN _____

_____

JUDGE, FEDERAL
DISTRICT COURT